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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1094

HERMAN L. WOMACK

and

POTOMAC NEWS COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above titled case on December 7, 1972 and December 31, 1974.

OPINIONS BELOW

The Petitioners, Herman L. Womack and the Potomac News Company, were convicted in the United States District Court for the District of Columbia, on August 25, 1971. The convictions were affirmed in part, by the United States Court of Appeals for the District of Columbia Circuit on December 7, 1972, ____ U.S. App. D.C. ____, ____ F.2d ____, record page A. 1a. Thereafter on December 31, 1974, the remaining question was decided adversely to the Petitioners; this opinion is also unreported, ____ U.S. App. D.C. ____, ____ F.2d ____, record page A. 27a.

JURISDICTIONAL STATEMENT

The Petitioners were charged in a twenty-three count Indictment with twenty violations of Title 18, U.S. Code, §1462, (Interstate transportation of obscene matter), and in three counts with violating Title 18, U.S. Code, §1461, (Mailing non-mailable material and giving information through the mail where obscene matter may be obtained). A jury trial was held before Judge Barrington Parker in the United States District Court for the District of Columbia, commencing on July 6, 1971, resulting in a verdict on July 22, 1971, of guilty on twelve counts of interstate transportation of obscene material and guilty on three counts of mailing non-mailable matter. On August 25, 1971, the United States District Court for the District of Columbia entered judgment and sentenced the Petitioner, Herman L. Womack, to serve one to three years imprisonment on Counts 1, 2, 3, 5, 8, 9, 10, 11, 12, 13, 15, 16, 17 and 20, (Concurrent with each other), and to serve eighteen months to four and one-half years imprisonment on Counts 21, 22 and 23, (Concurrent with each other

but consecutive to the sentence imposed upon the prior counts). The United States District Court for the District of Columbia sentenced the Petitioner, Potomac News Company, to pay a fine of $2,000.00 upon each Count cumulatively, (A total fine of $30,000.00). On August 30, 1971, each Petitioner filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgments. The District Court had jurisdiction of the trial and the United States Court of Appeals for the District of Columbia Circuit had jurisdiction on Appeal pursuant to Title 28, U.S. Code, §1291.

The United States Court of Appeals for the District of Columbia Circuit affirmed in part the Petitioners' convictions on December 7, 1972 and affirmed the balance of the Petitioners' convictions on December 31, 1974. A timely Motion for Rehearing was filed and denied by the United States Court of Appeals for the District of Columbia Circuit on January 31, 1975. The jurisdiction of this Court is envoked under Title 28, United States Code, Section 1254, (1); 2101.

QUESTIONS PRESENTED

I. Does the due process of law provision of the Fifth Amendment to the Constitution of the United States of America mandate the employment by the defense in an obscenity prosecution of comparable magazines bearing a reasonable resemblance to the challenged literature and which had been tested and afforded constitutional protection by the Courts of the United States?

II. Does the First Amendment to the Constitution of the United States of America protect the eight challenged magazines involved herein?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the First Amendment and Fifth Amendment to the Constitution of the United States of America and of Title 18, United States Code, Section 1461 and Section 1462, are set forth in the Appendix hereto at record page, A. 31a.

STATEMENT OF THE CASE

On April 22, 1970, Metropolitan Police Officers, William L. Hampton and Joseph E. Ranalli, obtained a search warrant from the Superior Court of the District of Columbia (then the District of Columbia Court of General Sessions), authorizing the search of the premises of Guild Press, Ltd., and the Potomac News Company at 507 Eighth Street, S.E., Washington, D.C. This warrant was executed by a combination of the Metropolitan Police, United States Post Office Inspectors, and Agents of the Federal Bureau of Investigation, on April 24, 1970. Simultaneously with the execution of this warrant, in the District of Columbia, the Agents of the Federal Bureau of Investigation conducted raids pursuant to warrants issued in different cities throughout the United States based upon the same information supplied by Officers Ranalli and Hampton, to obtain documentary evidence of interstate sales of alleged obscene material. (Transcript, Vol. 2, Pages 145, 224, 227, 229, 231, 235, 239, 241-243, Appendix Pages 75, 136, 141, 143, 146, 149, 150-152. This resulted in a 24 count Indictment being returned against the Petitioners and two other Defendants, (Appendix Page 1-9). The Petitioners moved to suppress all items which were seized from the Petitioners' premises, which motion was granted in part and denied in part, (Opinion of Judge Parker, Appendix

Page 10-35). The Petitioners were brought to trial in the United States District Court for the District of Columbia, before Judge Barrington Parker and a jury, on July 6, 1971, charged in 21 counts with violating Title 18, U.S. Code, §1462, (Interstate transportation of obscene materials), and in 3 counts with violating Title 18, U.S. Code, §1461, (Mailing non-mailable material and giving information through the mail where obscene material could be obtained), (Appendix Page 1-9). At the trial the Government introduced evidence proving the interstate transportation of the nine questioned magazines, "Boys No. 1", "Boys No. 2", "Boys No. 3", "Checkmate", "Chicken Little No. 2", "Auto-fellatio and Masturbation", "Phallic Development in the Pre-Adolescent", "Phallic Development in the Adolescent", "My Last Time Never Again", and "Boys Who Seduce Other Boys". The District Court from the outset, on Voire Dire and throughout the trial, prohibited Petitioners from, in any way, utilizing for comparison purposes, any comparable magazines that had been afforded constitutional protection by various Courts in the United States, including the Supreme Court of the United States, and from comparing any of the nine questioned magazines with any other literature in general distribution and nationally accepted, (Transcript, Vol. 1, Pages 7-10, 21-26, 33; Vol. 5, Pages 517-520, 532-533, 535-542, 569, 599, 614, 656-664; Vol. 6, Pages 669-671, 673, 677, 679, 689, 787; Vol. 8, Pages 1008, 1029, 1044, 1078; Vol. 10, Pages 1118-1123; Vol. 12, Pages 1399; Appendix Pages 47-54, 341-344, 356-365, 392, 420, 429, 469-481, 484, 486-487, 493, 546-647, 730-731, 747-749, 759-760, 787-788, 810-815.)

The Government introduced the testimony of two ex-employees of Guild Press, Ltd., upon the theory that

Guild Press, Ltd., and Potomac News Company were interchangeable, (Transcript, Vol. 2, Page 125, Appendix Page 62), and through the testimony of Vincent Barraco, (Transcript, Vol. 3, Pages 256, 258, 269; Appendix Pages 159, 161, 172), and Milford E. Evens, (Transcript, Vol. 3, Pages 395, 396, 400, 406, 410-411, 415-417; Vol. 4, Page 425, Appendix Pages 270-272, 275, 279-280, 283-285, 288-291, 293-294), proved scienter or knowledge of the Petitioner, Womack, of the contents of the nine challenged magazines. The same two witnesses testified that they were instructed by the Petitioner Womack, to avoid pandering of the magazines, (Transcript, Vol. 3, Pages 272-273, 280-283, 338, 354-357, 413, 415; Vol. 4, Page 456, Appendix Pages 175-176, 183-186, 222-223, 235-238, 286-288, 296). The Government presented Dr. Cavanaugh, a psychiatrist, who was of the opinion that all of the nine challenged magazines would appeal to the prurient interest of homosexuals and pedophiles, (Transcript, Vol. 4, Pages 472-475, 480, 484-485, 487, 488-489, 490, 492, Appendix Pages 307-310, 315, 319-320, 322-325, 327). The Government presented Frank Getlein, the art critic from the Washington Star newspaper, who was of the opinion that the nine magazines at issue, exceeded the contemporary community standards of tolerance of photographs depicting sex in literature in the United States, (Transcript Vol. 5, Pages 627-630, 637-651, Appendix Pages 441-444, 451-465), although he had observed comparable magazines sold throughout the United States, (Transcript, Vol. 5, Page 623; Vol. 6, Pages 694, 6969, 701, 717-719, Appendix Pages 437-438, 496-499, 503, 518-520). After the Government rested its case, the Petitioners moved the Court to enter a judgment of acquittal which was denied as to the Petitioners and a Co-defendant, and granted as to another Co-defendant, Mrs. Angela Grimmer, the

Secretary of the Corporate Petitioner, (Transcript Vol. 6, Page 751, Appendix Page 543). The Petitioners then introduced the testimony of Dr. Nachand, a psychologist, who voiced his opinion that the nine challenged magazines would not appeal to a prurient interest, (Transcript, Vol. 7, Pages 806-822, Appendix Pages 560-575), since the magazines contaned only a normal erotic appeal which was not morbid, inordinate, or prurient, (Transcript, Vol. 6, Page 812; Vol. 7, Pages 822, 832, 838, 842, 844, 847, 852, 854, Appendix Pages 565-566, 575-576, 582-583, 588-599, 592, 593, 594-595, 597-580, 602, 604). Dr. Nachand was of the opinion that the nine challenged books would be interesting to some people and have entertainment value for others, (Transcript, Vol. 7, Pages 897, 899-900, Appendix Pages 641, 643-644). The Doctor recognized that some of the magazines could appeal to a small group of pedophiles, (Transcript, Vol. 7, Pages 864, 888-890, Appendix Pages 612, 632-634), but that the magazines would only appeal to a normal interest in sex of the average homosexual, (Transcript, Vol. 7, Page 894, Appendix Page 638).

The Petitioners' defense developed around the testimony of Dr. Money, a psychologist from Johns Hopkins University, who contributed to the Presidential Commission Report on Obscenity, (Transcript, Vol. 7, Page 907, Appendix Page 650-651), who was of the opinion that the nine challenged magazines would generally appeal to an erotic interest but not a prurient interest of a homosexual or pedophile, (Transcript, Vol. 7, Pages 908, 912, 914, 916, 918, 920, 921, Appendix Pages 651-652, 655-665), and that the magazines would have normal appeal and a curiosity appeal which would soon be satiated, (Transcript, Vol. 7, Page 911, Appendix Page 654-655), for all except a few possible "picture freaks", (Transcript, Vol. 7, Page

933, Appendix Page 676), and that the pedophiles who would be interested in photographs as contained in the challenged magazines would be very rare, (Transcript, Vol. 7, Page 934, Appendix Page 677). Dr. Athanasiou, a psychologist, from Johns Hopkins University, who had conducted surveys on contemporary community standards and made contributions to the Presidential Commission Report on Obscenity, (Transcript, Vol. 8, Page 987, Appendix Page 712-713), was also of the opinion that none of the exhibits would appeal to the prurient interest, (Transcript, Vol. 8, Page 988, Appendix Page 714). Dr. Athanasiou also expressed his opinion that the majority of the experts in this field believe that photographs of young boys would not appeal to the prurient interest of pedophiles, (Transcript, Vol. 8, Pages 1006-1007, 1021, Appendix Pages 729-730, 743), and that the nine exhibits involved in the prosecution in the Court below were comparable to heterosexual pinup photographs. He also stated that the "Phallic Development" books, were, in fact, used in the treatment of patients at Johns Hopkins University in Baltimore, (Transcript, Vol. 8, Page 1018, Appendix Page 740).

The Petitioners also relied upon the testimony of Dr. Kastner, a local psychiatrist, with considerable experience with juveniles as well as with homosexuals, (Transcript, Vol. 8, Page 1037, Appendix Page 753-755), who was of the opinion that all of the exhibits would not appeal to the prurient interest of the average person, the average homosexual or the average pedophile, in the United States, (Transcript, Vol. 8, Pages 1039, 1040-1046, 1049, Appendix Pages 755-762, 765), but that the magazines would have only a normal erotic interest for the viewer. The Doctor also stated that some persons would utilize the nine challenged exhibits as a visual aid in masturbation

which, in his opinion, was beneficial to society as an outlet to prevent other anti-social activities. The Doctor also was of the opinion that the photographs contained in the nine exhibits were comparable to heterosexual "pinups", (Transcript, Vol. 8, Page 1061, Appendix Page 776-777).

Petitioners concluded their expert testimony with Dr. Robert M. Doud, a psychologist who was qualified by the Court to voice an opinion regarding contemporary community standards depicting sex in photographs in literature, (Transcript, Vol. 10, Pages 1112, 1116, Appendix Pages 804, 808), who stated his opinion that the nine challenged magazines would not exceed national community standards and would not appeal to the prurient interest of the average adult, average homosexual, or average pedophile, (Transcript, Vol. 10, Pages 1119, 1126, Appendix Pages 811-818).

The Petitioners in an attempt to rebut the testimony of Frank Getlein, introduced two homosexual authors of renown, Mr. George M. Haimsohn and Mr. James Balke, both of whom have obtained success in the literary world as novelists and playwrights, (Transcript, Vol. 8, Pages 960, 977, Appendix Pages 696, 704). Both witnesses were of the opinion that the "Phallic Development" books, "My Last Time Never Again" and "Boys Who Seduce Other Boys" and "Auto-fellatio and Masturbation", were interesting to read, had educational value, and that the characters therein portrayed, were adhesive to the reader's interest and that the stories were competently presented thereby establishing the literary merit of the questioned magazines, (Transcript, Vol. 8, Pages 971, 973, 981, and 983, Appendix Pages 701-703, 707-709).

Among several homosexual members of the Washington, D.C. Chapter of the Mattachine Society, who presented

themselves as witnesses, the Court permitted the Petitioners to call only Dr. Franklin E. Kameny, as an expert on homosexuality, (Transcript, Vol. 8, Pages 1033-1036, Appendix Pages 749-752), who, after decertifying Dr. Cavanaugh as an expert on homosexuality, (Transcript, Vol. 8, Page 1068, Appendix Page 783-784), testified that the nine challenged magazines would not appeal to the prurient interest of the average homosexual, since they would appeal only to the normal erotic interest of members of the homosexual minority group, (Transcript, Vol. 8, Pages 1081-1083, Appendix Pages 789-792). The Petitioners produced testimony through Raymond Pechin, the national sales manager of Potomac News Company, regarding the quantity of national distribution and acceptance of the nine challenged magazines, (Transcript, Vol. 7, Pages 1092, 1095-1098, Appendix Pages 797-803).

The Defense concluded its witnesses with J.J. Proferes, the Editor of Guild Press, Ltd., and the author of the majority of the nine challenged magazines and with David Hurles, the photographer who contributed the photographs and story ideas for one on the nine challenged magazines, "Auto-fellatio and Masturbation", (Transcript, Vol. 10, Page 1197; Vol. 11, Pages 1209, 1266-1272, Appendix Pages 875-876, 877-878, 885-890).

The Petitioners again moved the Court to acquit the Defendants, which Motion was granted as to the Co-defendant, Donald Branca, who was discharged, (Transcript, Vol. 11, Page 1288, 1304, Appendix Page 894), and which Motion was denied as to the Petitioners, Herman L. Womack, and Potomac News Company. The Petitioners requested the Court to instruct the jury that the alleged prurient appeal should be gauged upon the average member of the deviant group, as opposed to the most susceptible members

of the deviant group, (Transcript, Vol. 11, Pages 1311, 1315, 1317, 1321-1323, 1349, Appendix Pages 897, 900, 902, 905-907). The Court denied Petitioners' requested instructions, (Transcript, Vol. 12, Page 1355, Appendix Page 915), and the Court instructed the jury accordingly, to which the Petitioners took exception, (Transcript, Vol. 12, Pages 1412, 1423, 1424, 1434, Appendix Pages 916, 927-928, 938). During their deliberations the jury requested and received additional instructions upon the definition of obscenity and the jury inquired of the Court if a non-obscene book, "Auto-fellatio and Masturbation", was included in the same count of the Indictment with an obscene book, "Phallic Development in the Pre-adolescent", must the jury return a verdict of guilty, [Count Eleven], (Transcript, Vol. 12, Pages 1443, 1444, Appendix Pages 4, 941-943). Following additional instructions, the jury returned a verdict convicting the Petitioners on fifteen counts and acquitting the Petitioners on all counts involving the two magazines, "Auto-fellatio and Masturbation" and "Checkmate", when they were not incorporated in a count with another of the challenged magazines. On the 25th day of August, 1971, the Petitioner, Herman L. Womack, was sentenced to serve from three to seven and one half years in the custody of the Attorney General and Petitioner and the Potomac News Company, was sentenced to pay a fine of $30,000.00. Appeals to the United States Court of Appeals for the District of Columbia Circuit were duly noted by the Petitioners.

The United States Court of Appeals for the District of Columbia Circuit bifurcated the Petitioners' appeal and affirmed, on December 7, 1972, the two evidentiary issues relating to prohibiting the Petitioners from in any way utilizing comparable books and magazines to establish community

standards of acceptance, or for use in impeaching the Government expert witnesses relating to comparable materials which were not obscene. The United States Court of Appeals for the District of Columbia Circuit also affirmed the Petitioners' appeal relating to the Fourth Amendment, search and seizure, issue. On December 31, 1974 the United States Court of Appeals for the District of Columbia Circuit affirmed the remaining issue, involving the First Amendment claims of the Petitioners. The Petitioners requested a rehearing by the United States Court of Appeals for the District of Columbia Circuit, en banc, which was denied on January 31, 1975.

HOW FEDERAL QUESTIONS ARE PRESENTED

At the Petitioners trial in the United States District Court for the District of Columbia, during voire dire examination, the Court ruled in this obscenity prosecution that it would not permit the use by the Petitioners of comparable magazines to establish "Community Standards", and thereafter during the trial the District Court prohibited the Petitioners from using comparable magazines for any purpose, including cross examination of the expert witnesses. The Petitioners argued on appeal that the "Due Process of Law" provisions of the Fifth Amendment to the Constitution of the United States of America mandated the employment by the defense in an obscenity prosecution of comparable magazines, bearing a reasonable resemblance to the challenged literature, which had been tested and afforded Constitutional protection by the Courts of the United States. In addition thereto, Petitioners argued that the First Amendment to the Constitution of the United States of America protects the eight challenged "Homosexual" magazines involved herein. The United

States Court of Appeals for the District of Columbia Circuit in its decision of December 7, 1972 ruled that the Fifth Amendment to the Constitution of the United States of America did not mandate the employment by the defense in an obscenity prosecution of comparable magazines as autopical evidence. The United States Court of Appeals for the District of Columbia Circuit in its decision of December 31, 1974, concluded that the First Amendment to the Constitution of the United States of America did not protect the eight challenged "Homosexual" magazines involved herein.

REASONS FOR GRANTING THE WRIT

Petitioners argue that the due process of law provision of the Fifth Amendment to the Constitution of the United States of America, mandates the employment by the defense in an obscenity prosecution of comparable magazines bearing a reasonable resemblance to the challenged literature, which had been tested and afforded constitutional protection by the Courts of the United States.

The United States Court of Appeals for the District of Columbia Circuit in 1961, in *Womack v. United States,* 294 F.2d 204, at 206, 111 U.S. App. D.C. 8 at P. 10 said:

> "The trial judge denied admission into evidence of dozens of books and magazines which contained nudes and which are regularly sold in ordinary commerce. We think he correctly did so. The proffered evidence was immaterial, i.e., of no probative weight in reaching a decision upon the issue at trial. The fact that nudes by Manet, Titian, Raphael, Rembrandt, Picasso, and many

> others are accepted commercial items is of no possible probative value in deciding whether these particular photographs, which alone are in issue here, are obscene and filthy.
>
> . . . Apart from the foregoing dispositive of the point is the fact that Womack made no attempt to show, as a foundation for his proffer, any resemblance between the proffered works of art and the photographs he was putting in the mail. The predicate for a conclusion that a disputed piece of mailed matter is acceptable under contemporary community standards, as shown by proffered other matter already in unquestioned circulation, must be that the two types of matter are similar. And as another part of his foundation he must show a reasonable degree of community acceptance of works like his own."

Thereafter, it was established in the District of Columbia, in an obscenity prosecution, that when a defendant offered exhibits to be considered to be compared by the jury with the challenged exhibits, the tendered defense exhibits must: (1) Reasonably resemble the challenged exhibits and; (2) The Defendant must show a reasonable degree of community acceptance of the proffered comparable exhibits. This rule of law has been followed in other circuits, *United States v. Jacobs,* 433 F.2d 932 (1970) and by the District of Columbia Court of Appeals in *Huffman v. U.S.*, 259 A.2d 342. In *Huffman v. U.S., supra,* the Chief Judge of the District of Columbia Court of Appeals held the proffered exhibits irrelevant stating, 259 A.2d 342 at 344:

"One of appellants' main arguments is that the trial court was in error in not admitting in evidence twenty-six tendered exhibits. These exhibits consisted of eleven different copies of 'Cover Girl', eleven different copies of 'Exciting', one copy of 'Hellenic Sun', one copy of 'International Nudist Sun', one copy of 'Review International', and one copy of 'Exclusive' which contained photographs of single nude females. The others contained photographs of nude males. Appellant argues that certain of the tendered exhibits had been declared nonobscene by the Supreme Court and the others were comparable to those 'cleared by the Supreme Court'.

The exact purpose for which these exhibits were offered is not clear, but one purpose apparently was to have them shown to the jury and have the jury told that certain of them had been declared nonobscene by the Supreme Court. We hold they were not admissible for this purpose. In the first place, neither the trial judge nor anyone else could possibly tell the jury why the Supreme Court ruled that the exhibits were nonobscene; and it would certainly serve no valid purpose to permit the jury to speculate as to what should be the holding of the Supreme Court with respect to the exhibits herein at issue. In the second place, there is a vast difference between photographs portraying sexual activity between two nudes and photographs of single nudes. The tendered exhibits would have had no probative weight on the issue before the jury. For the same reason the tendered exhibits

> were not admissible as proof of contemporary community standards even if it is true as asserted by counsel at trial, that the tendered exhibits 'are sold all over the United States.' The fallacy in counsel's argument is his premise that the tendered exhibits are comparable to the material possessed and sold by appellants."

That opinion had tentatively been upheld by the United States Court of Appeals for the District of Columbia Circuit, *Huffman v. U.S.*, 152 U.S. App. D.C. 238, 470 F.2d 386 (1971), set aside on other grounds, June 28, 1974, ____ U.S. App. D.C. ____, wherein the Court said,

> "The magazines offered by appellants were those involved in the *Central Magazine and Potomac News* cases, *supra*. These magazines – 'Exciting', 'Cover Girl', 'Hellenic Sun', and others – fall within the category of 'singles'. As discussed above, this type of magazine is clearly distinguishable from the genre involved here. We do not say that decisions involving other publications can play no part in the evaluation of a particular magazine or book. Certainly a judge passing on the legal 'obscenity' of material before him will consider whether it is so close to others already passed on by the courts as to require a judicial ruling on obscenity without submission to the jury. Once the judge declines to dismiss the prosecution on legal grounds we think it becomes a matter of sound discretion, that takes into account relatedness and remoteness, whether it is more likely to be helpful or confusing for the jury to make comparisons with publications passed on in previous

> cases. In view of the important distinctions between the 'duals' photographs in the magazines on trial and the singles in previous cases, we hold the judge did not abuse his discretion in ruling against appellants on this issue."

In the District Court the defense was stymied from, in any way, even attempting to demonstrate that its proffered defense exhibits were comparable to the challenged magazines and that the proffered exhibits had been adjudicated to be constitutionally protected in the Courts of the United States and were in general distribution and accepted through the United States, (Transcript, Vol. 1, Pages 7-10, 21-26, 33; Vol. 5, Pages 517-520, 532-533, 535-542, 569, 599, 614, 656-664; Vol. 6, Pages 669-671, 673, 677, 679, 698, 787; Vol. 8, Pages 1009, 1029, 1044, 1078; Vol. 10, Pages 1118-1123; Vol. 12, Page 1399; Appendix Pages 47-54, 341-344, 356-365, 392, 420, 429, 469-481, 484, 486-487, 493, 546-547, 730-731, 747-749, 759-760, 787-788, 810-815). Commencing with the Voire Dire examination the Petitioners were prevented from, in any way, talking about comparable literature or demonstrating comparable literature to the jury. The Petitioners were prohibited from questioning the Government witness, Dr. Cavanaugh, regarding Defendants' exhibits for identification Nos. 23 through 27C, all of which Defense exhibits were magazines very comparable to the nine challenged magazines involved herein and all of the defense's proffered exhibits had been afforded constitutional protection by the Supreme Court of the United States of America in *Bloss v. Dykema*, 398 U.S. 278, reversing 17 Mich. App. 318, 169, N.W.2d 367 (No. 23, No. 24, Exciting); *Manual Enterprises v. Day*, 370 U.S. 478, (No. 25, No. 25a, No. 25b, Grecian Guild Pictorial, Trim, Manual); *Potomac News Co. v. U.S.*, 389 U.S. 47, reversing *U.S. v. 56 Cartons of*

"Hellenic Sun", 373 F.2d 635, (No. 26 Hellenic Sun); *Felton v. Pensacola*, 390 U.S. 340, reversing 200 So.2d 842, (No. 27, 27a, 27b, 27c, A Hundred Naked Rebels, Solis, Review International No. 1, Review International No. 2). The District Court would not permit the defense the latitude which had been permitted by the Superior Court of the District of Columbia, (then the D.C. Court of General Sessions), in the original trial of Huffman and Pryba, supra, *U.S. v. Huffman and Pryba*, 152 U.S. App. D.C. 238 at 243.

> "During the trial appellants attempted to challenge the assertion that the magazines were obscene by offering twenty-six other publications that had previously been declared non-obscene by the Supreme Court. The trial court refused to allow appellants to make this comparison to the jury but permitted appellants to ask Dr. Cavanaugh whether six of the exhibits appealed to prurient interests. Dr. Cavanuagh testified that individual magazines in this group would appeal to the prurient interests of various classes of persons, including male and female homosexuals, heterosexual males, and pedophiliacs."

The Petitioners attempted to cross-examine the Government's "expert on contemporary community standards", Mr. Getlein, regarding Defendants' exhibits for identification No. 28 through No. 28i, all being the posters of front view male nudes which were involved as the exhibits in the case of *U.S. v. Spinar and Germain*, 440 F.2d 1241. All of these posters were comparable to the photographs contained in the challenged magazines and all of the posters had been afforded the protection of the Constitution of the United States of America, where the Court stated at Page 1242,

"The materials in question consist of advertisements for 2' by 3' posters as well as the posters themselves. The subject matter depicted are nude or nearly nude males, all with their genitals fully exposed. Most of the pictures show a single male; some portray more than one male. There is no sexual activity shown although in some of the pictures the male organ appears not to be in a state of complete repose. There is certainly no attempt by photographic artistry to shade or blur the genital area. Each of the advertisements and photographs listed in the indictment were requested and received by a postal inspector using fictitious names and addresses.

We are bound of course by the law of obscenity as declared by the United States Supreme Court. It is our considered opinion that the materials involved in this case cannot be distinguished in any meaningful way from that material held not obscene in recent Supreme Court decisions."

The District Court erroneously prohibited the Petitioners from using proffered exhibits, books, magazines, and posters that had been afforded constitutional protection and which the defendants' experts on contemporary community standards were prepared to testify received general acceptance throughout the United States, through dissemination in large quantities in adult bookstores, thereby effectively preventing the Petitioners from in any way proving that the challenged magazines were within the contemporary community standards of acceptance of erotic literature, (Transcript, Vol. 7, Page 787; Vol. 8, Pages 1029, 1078; Vol. 10, Pages 1118, 1121, Appendix Pages 546-547, 748-749,

787-788, 810, 813), and from corroborating the testimony of the defense witnesses with admissible autopical evidence. The District Court refused to permit the Petitioners to produce testimony, through qualified expert witnesses, regarding the other defense proffered exhibits, which were comparable to the exhibits challenged in the trial below, that the defense proffered exhibits were generally accepted throughout the nation, *U.S. v. Spinar and Germain*, U.S.D.C. Minn., Judge Earl Larson, 4-67 Crim. 15 (7/26/67), (No. 33 thru No. 39, "A Hundred Naked Rebels," "Butch No. 2", "Butch No. 5", "Butch No. 3", "Tiger No. 1", "Tiger No. 2", "Male Nudist Portfolio").

In the 1961 Opinion in *Womack v. U.S.*, 111 U.S. App. D.C. 8 at Page 10, the United States Court of Appeals for the District of Columbia Circuit recognized that the exhibits which the defense there tendered were photographs of statutes from museums and works of art, paintings of the masters, and not comparable to the challenged "Stark, unretouched photographs". The proffered exhibit. "A Hundred Naked Rebels", marked for identification by the District Court as No. 27 and No. 33, and the "Butch" and "Tiger" Books No. 34-No. 38, Petitioners argue are all very similar to the challenged magazines, and the District Court erred by prohibiting the Petitioners from proving that magazines comparable to the challenged magazines were generally accepted in the national community. Petitioners note that United States Circuit Court of Appeals in *U.S. v. West Coast News Company*, 228 F. Supp. 171, affirmed 357 F.2d 855, excluded proffered defense exhibits as comparable and this decision was reversed by the Supreme Court of the United States, sub nom. *Aday v. U.S.* 87 S.Ct. 2095, 388 U.S. 447, 18 L.Ed. 2d 1309. Similarly, the United States Circuit Court of Appeals in *Books, Inc. v. U.S.*, 358 F.2d 935, affirmed the United

States District Court in Rhode Island in preventing the defense from introducing allegedly comparable publications which the defense asserted made up the comparable community standards, and this decision was also reversed by the Supreme Court of the United States at 87 S.Ct. 2098, 388 U.S. 449, 18 L.Ed. 2d 1311. Petitioners also note that the Circuit Court allowed the door to remain ajar for the District Court to compare other publications, that had been involved in litigation, with the challenged magazines, however, in this case on appeal, the District Court interpreted the decision in *Womack v. U.S., supra,* to prohibit the use of any other magazines for any purpose whatsoever, autopical or testimonial. The witnesses were not only prohibited from exhibiting the magazines to demonstrate to the jury examples of what material is now accepted in the national community but the witnesses were also prohibited from testifying about the types of magazines that are now generally accepted. The defense was stripped of all protection to rebut the Government's allegations of obscenity and the Petitioners were thereby deprived of their liberty and property, without due process of law as provided and protected by the Fifth Amendment to the Constitution of the United States of America.

Based upon the foregoing, Petitioners argue that this Court should issue a Writ of Certiorari to reverse their convictions.

Petitioners urge the Court to issue the Writ because the First Amendment to the Constitution of the United States of America protects the eight challenged magazines involved herein.

Petitioners argue that the eight challenged magazines, "Boys No. 1", "Boys No. 2", "Boys Nos. 3", "Chicken Little No. 2",

"Phallic Development in the Pre-Adolescent", "Phallic Development in the Adolescent", "My Last Time Never Again", and "Boys Who Seduce Other Boys", do not appeal to the prurient interests of the average homosexual, (the persons who would purchase these books) and are constitutionally protected by the First Amendment, and therefore, not obscene. The book, "Auto-Fellatio and Masturbation", which happens to be the only book which contains photographs vividly depicting sexual activity, was acquitted in the only count of the Indictment where it stood alone, Count No. 5; following the jury submitting a note to the Court in the following language, "Where *two or more* publications are involved in one count, if one is considered 'obscene' and the other(s) 'not obscene', are we obligated to vote guilty'^", (Transcript, Vol. 12, Pages 1443-1444, Appendix Page 943). The Petitioners were acquitted on Count No. 8, the only count involving the ninth challenged magazine, "Checkmate". The jury obviously found that the book, "Auto-Fellatio and Masturbation", was not obscene when considered as a whole.

Petitioners argue that the eight challenged exhibits are constitutionally protected as "homosexual literature", erotically appealing to homosexuals but not appealing to their prurient interest. Homosexuals are not second class citizens, however, they have been forced to fight for the right to receive erotic literature which they find entertaining, *U.S. v. 56 Cartons of "Hellenic Sun"*, 253 F. Supp. 498, affirmed 373 F.2d 635, reversed sub nom. *U.S. v. Potomac News Co.*, 398 U.S. 47; *Manual Enterprises v. Day*, 370 U.S. 478, 8 L.Ed.2d 639, 82 S.Ct. 1432; *One, Inc. v. Oleson*, 355 U.S. 478, 2 L.Ed.2d 352, 78 S.Ct. 364 where the Supreme Court of the United States unanimously reversed the decision of the Court of Appeals in 241 F.2d 772, without opinion, which decision was

described by Lockhard and McClure, "Obscenity-Censorship: The Core Constitutional Issue–What Is Obscene?" 7 Utah Law Review 289, 293 (1961): . . . "This was a magazine for homosexuals entitled One–The Homosexual Magazine, which was definitely not a scientific or critical magazine, but appears to have been written to appeal to the taste and interest of homosexuals". The Petitioners, Herman Lynn Womack and the Potomac News Company, have been the champions of the homosexual cause in the last decade. At their own expense they have successfully litigated to obtain for all homosexuals the homosexual nudist magazine, "Hellenic Sun", (Defendants' exhibit for identification No. 26), *Potomac News Co. v. U.S., supra,* and the homosexual physique pin-up magazines, "Grecian Guild Pictorial", "Trim", and "MANual", (Defendants' exhibits for identification Nos. 25, 25a, 25b), *Manual Enterprises v. Day, Supra.* The Court must observe that these Petitioners are in no way involved with the alleged corruption of the adolescent models depicted in the photographs contained in the eight remaining challenged magazines. The majority of the photographs were purchased "over-the-counter" in New York City and delivered to the Guild Press offices in Washington, D. C., (Transcript, Vo. 10, Page 1185, Appendix Page 966). The same models photographs appear in competitors publications, mostly more graphically depicting sexual activities than the seven remaining challenged magazines because the Petitioners restricted themselves to non-prurient simulation without "erections" (Vol. 3, Page 272, Appendix Page 175-176), Defendants exhibits for identification No. 32 –"Young Boys and Oral Sex"; No. 32a–"Young Boys and Masturbation"; No. 32b–"Young Boys and Sex Review"; No. 32c– "Young Boys and Bondage"; No. 32d–"Teenage Sex Perversion"; No. 32e–"Young Boys and

Sodomy"; No. 32f–"Young Boys and Fellatio"; No. 32g–"Young Boys and Sex Play".

Men were not made in a fixed mold. If a publication caters to the erotic interest of a minority, why doesn't it have social importance if it is entertaining, so long as it does not appeal to the prurient interest of the viewers? In the trial the defense clearly proved through the testimony of Dr. Money, who was so eminently qualified that the Assistant United States Attorney did not dare to challenge him upon Voire Dire, that the eight challenged exhibits would not appeal to the prurient interest of homosexuals or pedophiles but would only appeal to an erotic interest, (Transcript, Vol. 7, Pages 908, 911-921, Appendix Pages 651-652, 654-665). This testimony was corroborated by that of Dr. Nachand, (Transcript, Vol. 7, Pages 806-822, 832, 838, 842, 847, 852, 854, Appendix Pages 560-576, 582, 588, 592, 597, 602, 604), and by Dr. Athanasiou, (Transcript, Vol. 8, Pages 998-1014, Appendix Pages 720-737), and Dr. Kastner, (Transcript, Vol. 8, Pages 1039-1046, Appendix Pages 755-762), and Dr. Doud, (Transcript, Vol. 10, Pages 1119-1126, Appendix Pages 811-818). These are the men that the late Justice Frankfurter must have envisioned when he wrote his concurring opinion in *Smith v. California,* 361 U.S. 151, at Page 164.

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity–a right implicit in the very nature of the legal concept of obscenity–to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and

to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determine the patentability of a controverted device.

There is no external measuring rod for obscenity. Neither, on the other hand, is it ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed.2d 1948, 1509 77 S.Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual

> juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.'
>
> . . . Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case."

All of the defense experts being of the enlightened school of thought on homosexuality basing their opinions upon research and not upon archaic religious prejudice. It should be noted that Dr. Money and Dr. Athanasiou were contributors to the Presidential Commission Report on Obscenity, (Transcript, Vol. 7, Page 907; Vol. 8, Page 987, Appendix Pages 650-651, 713). The trial in the District Court was not merely the defense of the Petitioners but rather, a crusade upon behalf of homosexual rights by the Petitioners, which inspired Franklin Kameny, the President of the Washington, D.C. Chapter of the Mattachine Society, who was qualified as an expert upon homosexuality, (Transcript, Vol. 8, Pages 1068, 1081-1083, Appendix Pages 783, 789-792), to voice his opinion as a homosexual, that the challenged magazines would have no prurient appeal to the average homosexual but merely an erotic appeal, comparable to the appeal of a "Playboy" magazine to the so-called "normal heterosexual".

The First Amedment to the Constitution of the United States has historically protected the minority view, which

is in most instances unpopular because it is the minority view. The homosexual is the second largest minority group in the United States, following the Blacks, and the homosexual should be permitted to receive literature which appeals to his erotic interest, which he finds entertaining, which he finds enjoyable, regardless of its educational value, literary merit, or other social worth, so long as it is not an appeal to his prurient interest. The eight challenged magazines herein are such, and are as constitutionally protected as "Playboy" magazine which appeals to the erotic interest of the heterosexual. Thereupon, Petitioners argue, this Court should spread the mantle of the First Amendment over these magazines and issue the Writ to review the Petitioners convictions.

CONCLUSION

Petitioners conclude by urging this Court to issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, in consideration of the arguments herein contained which assert that the Petitioners were denied their liberty, and property, without due process of law as provided by the Fifth Amendment to the Constitution of the United States of America, when the United States District Court for the District of Columbia prohibited the use by the Petitioners of any autopical evidence for any purpose. Petitioners also conclude that this Court should issue its Writ of Certiorari to protect the First Amendment rights of the Petitioners, and of the homosexual population of the United States to receive and read literature appealing only to the erotic interest of homosexuals, and not to the prurient interests of the average member of the homosexual group. The eight challenged books and magazines involved herein are not obscene per se and therefore, are protected by the First Amendment to the Constitution of the United States of America as literature appealing only to the erotic interests of homosexuals, who have a Constitutional right to receive such literary materials, providing the literature does not appeal to the prurient interests of the average member of the homosexual population.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1711

UNITED STATES OF AMERICA

v.

HERMAN L. WOMACK, APPELLANT

No. 71-1894

UNITED STATES OF AMERICA

v.

POTOMAC NEWS COMPANY, APPELLANT

Appeals from the United States District Court for the District of Columbia

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Decided December 7, 1972 *

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* Only the evidentiary issues presented by these cases are disposed of by this opinion.

Mr. Stanley M. Dietz for appellants.

Mr. Robert D. Zsalman, Assistant United States Attorney with whom *Messrs. Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, and *Donald E. Campbell*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. Richard A. Hibey*, Assistant United States Attorney at the time the record was filed, also entered an appearance for appellee. *Mr. Thomas A. Flannery*, United States Attorney at the time the record was filed, also entered an appearance for appellee in No. 71-1894.

Before TAMM, *Circuit Judge*, WADE H. MCCREE, JR.,* *Circuit Judge for the Sixth Circuit* and MACKINNON, *Circuit Judge*.

MACKINNON, *Circuit Judge:* Appellants Womack and Potomac News, Co., Inc. were indicted on twenty counts of interstate transportation of obscene matter in violation of 18 U.S.C. § 1462[1] and three counts of mailing

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*Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

[1] 18 U.S.C. § 1462 provides:

§ 1462. Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

nonmailable matter and information stating how and where obscene materials were to be obtained, in violation of 18 U.S.C. § 1461.[2] A jury trial resulted in a verdict of guilty on twelve counts under § 1462 and on all three counts under § 1461.[3] On this appeal three issues are

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[2] 18 U.S.C. § 1461 provides:

> § 1461. Mailing obscene or crime-inciting matter
>
> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

[3] Appellant Womack was sentenced to serve one to three years' imprisonment on 12 counts (concurrent with each other) and to serve eighteen months to four and one-half years' imprisonment on three counts (concurrent with each other but consecutive to the sentence imposed upon the prior counts). The United States District Court for the District

raised: (1) the propriety of the exclusion by the trial court of a number of allegedly comparable magazines; (2) whether the eight magazines which formed the basis of appellants' convictions were obscene and not within the free speech guarantees of the First Amendment and (3) the validity of the search warrant under which the eight magazines were seized. In this opinion we consider only issues (1) and (3) and defer any opinion on (2) pending the decisions of the Supreme Court in *Alexander* v. *Virginia*, 212 Va. 554, 186 S.E.2d 43, *cert. granted*, 408 U.S. 921 (1972) and companion cases, involving similar issues which were argued on October 16, 1972.

I. *Comparison Evidence*

Appellants were convicted on the basis of eight explicit "magazines"[4] apparently directed at an audience of homo-

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of Columbia sentenced the appellant, Potomac News Company, to pay a fine of $2,000 upon each count cumulatively (a total fine of $30,000).

[4] The eight magazines are: *Boys No. 1, Boys No. 2, Boys No. 3*, (Government Exhibits Nos. 25, 26, 27) (5,000 copies of each were printed and single issues retailed for $3.00 each; Tr. 1095); *Chicken Little No. 2* (Ex. 28, 10,000 printed, $3.00 each); *Phallic Development in the Pre-Adolescent*, (Ex. 24, 20,000 printed, $5.00 each); *Phallic Development in the Adolescent* (Ex. 21-I, 20,000 printed, $5.00 each); *Boys Who Seduce Other Boys*, (Ex. 30, 20,000 printed, $3.50 each); and *My Last Time—Never Again* (Ex. 31, 20,000 printed, $3.50 each). Appellants were acquitted on counts 5 and 8, which involved the magazines *Auto-Fellatio and Masturbation*, (60,000-80,000 sold, $7.50 each) and *Checkmate* (Ex. 29, 5,000 printed, $3.00 each). Testimony as to printing volume, sales and the various prices charged at the different levels of distribution appear at Tr. 1095-1100. Additionally, under counts 22 and 23, the jury was allowed to consider only those advertising brochures which

sexuals and pedophiles.[5] The particular evidentiary issue on appeal involves appellants' attempts to introduce al-

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dealt with the original ten magazines set out in the indictment, i.e., Government Exhibits 21, 21-B, 22-A and 23-C. All other brochures involving other magazines were excluded by the trial court (Tr. 1287-1288).

The eight magazines in question consist of a collection of photographs showing young boys of the adolescent and pre-adolescent age group in a state of complete or partial nudity. The photographs have been cropped and the youngsters posed in a manner which highlights and emphasizes their exposed genitalia. In several instances, most noticeably on the back covers of both *Phallic Depevelopment* magazines, the cropping has been accomplished in such a way as to show the viewer nothing more than the genitals themselves and a small portion of the surrounding pubic region. Many photographs particularly those of the older boys, depict the penis in full or partial erection. A suggestion of masochism is present in several photographs by depicting totally nude youngsters bound by ropes while another is ensnared in a net. Among those photographs known in the trade as "singles," i.e., those portraying only one model, several boys are shown fondling their penises while another manually lathers his semi-erect penis with soap. Among those photographs known in the trade as "duals," i.e., those portraying two models, the youngsters are seen caressing, fondling, kissing, and embracing each other. In many instances the positions of the boys indicate that oral or anal sodomy is imminent. In one photograph (*Boys Who Seduce Other Boys* p. 33) it appears that anal sodomy is ongoing.

Only four of the magazines contain any substantial text. They generally consist of "case histories" in which certain portions are emphasized with bold face type. These passages deal with such diverse sexual activities as fellatio, anal sodomy and masturbation. The photographs accompanying the text depict nude males embracing and fondling each other, and are wholly unrelated to the text.

[5] There was expert testimony to the effect that these materials would appeal to pedophiles. A pedophile is an adult who has an erotic desire for a child. (Tr. 473-76, 478-

legedly comparable materials[6] into evidence for various

80, 480-82, 525-26, 865-67, 903-07, 913, 915-16, 919-21, 933-35). Appellants concede that the magazines were directed at a homosexual audience. (Appellants' Br. 28-29).

[6] The appellants offered a variety of materials for comparison to those at issue in this case consisting of thirty-five magazines and ten posters, some of which had been held nonobscene by various courts. Defense Exhibits 23 and 24 are copies of a heterosexual magazine called *Exciting* held nonobscene in Bloss v. Dykema, 398 U.S. 278 (1970). Nos. 25, 25a and 25b are "physique" magazines, *Grecian Guild Pictorial, Trim, Manual,* held nonobscene in Manual Enterprises v. Day, 370 U.S. 478 (1962). No. 26 is also a male physique magazine entitled *Hellenic Sun* held nonobscene in Potomac News Co. v. United States, 389 U.S. 47 (1967). Similarly, the materials that were the subject of the reversals of convictions in Felton v. Pensacola, 390 U.S. 340 (1968), magazines entitled, *A Hundred Naked Rebels, Solis, Review International* No. 1, *Review International* No. 2 were offered as defendants' exhibits Nos. 27, 27a, 27b, 27c. The ten posters (Defense Exhibits Nos. 28-28I) consisted of large individual photographs of partially nude adult males held nonobscene by the Eighth Circuit in Spinar v. United States, 440 F.2d 1241 (8th Cir. 1971). Appellants also cite to us an unreported District Court decision which held nonobscene a number of copies of magazines of the *Butch* and *Tiger* series, depicting nude males in-doors, mostly in "singles"—where there are "duals," the models are widely separated with no indication of sexual activity. United States v. Spinar, U.S.D.C. Minn. 4-67-Crim. 15 decided July 26, 1967. These magazines (*Butch* and *Tiger*) together with another copy of *A Hundred Naked Rebels* and *Male Nudist Portfolio* which were also exonerated in this District Court decision were offered as Defense Exhibits Nos. 33-39. Defense Exhibits 32-32g are magazines appellants claim were purchased from their competitors and are quite similar to those at issue here. They depict nude males, both young and adult engaging in acts of fellatio, anal sodomy and masturbation. As to these publications, appellants admit that no court has ever considered them in an obscenity prosecution.

purposes. Appellants contend they were denied due process of law in the District Court's refusal to admit any of the proffered exhibits. There has been a considerable amount of confusion in the courts as to the admissibility and function of comparison evidence in obscenity cases. Some jurisdictions have held it reversible error to reject such evidence, while others exclude it rather summarily.[7] Some of this confusion, it seems, stems from an inability to distinguish the various purposes for which comparison evidence is sought to be introduced. In this case appellants urge three distinct purposes which we will consider separately.

A. *Nonobscenity as a Matter of Law*

Appellants contend that they should be allowed as a requirement of due process to present the proffered comparison exhibits to the jury as primary autoptical evidence in order that the jury may compare materials previously held nonobscene by other courts (including the United States Supreme Court) to the exhibits which are the subject of the instant prosecution. This is clearly incorrect and involves a basic misconception of the respective roles of judge and jury. In essence it demands that the jury

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[7] *Compare* Woodruff v. State, 11 Md.App.202, 273 A.2d 436 (1971); Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962); In Re Harris, 16 Cal. Rptr. 889, 366 P.2d 305 (1961) *with* State v. Von Cleef, 102 N.J. Super. 102 245 A.2d 495 (1968); State v. Jungclaus, 176 Neb. 641, 126 N.W.2d 858 (1964); People v. Finkelstein, 11 N.Y.2d 300, 183 N.E.2d 661 (1962). In the Federal courts, *compare* Kahm v. United States, 300 F.2d 78, 84 (5th Cir. 1962) (admits evidence without discussion) *with* Miller v. United States, 431 F.2d 655, 659 (9th Cir. 1970) (excludes without discussion). *See also*, Annotation, "Modern Concept of Obscenity," 5 A.L.R.3d 1158, 1195 § 16[b] (1966); 50 AM. JUR. 2d *Lewdness, Indecency, and Obscenity* § 37.

perform the judge's task of determining whether this issue should be disposed of as a matter of law. That is, it requires the jury to interpret the effect of a previous holding of nonobscenity as it bears on the issues of the present case. Can it possibly be said that the jury is competent to interpret the *stare decisis* effect of various decisions, analyze the grounds of their holdings and distinguish them on their facts?[8] This is clearly beyond the province of the jury and is a basic function of the judge. When presented with a motion for a judgment of acquittal under FED. R. CRIM. P. 29, the judge properly should compare the evidence in the instant case with that held nonobscene by the controlling authority of that jurisdiction. If the matter held nonobscene by such courts, in his opinion, equals or exceeds[9] the evidence at issue, a judgment of acquittal should certainly be entered.

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[8] As one court points out, especially in light of the *Redrup* (Redrup v. New York, 386 U.S. 767 (1967)) line of cases cryptically reversing a large number of obscenity convictions, "neither the trial judge nor anyone else could probably tell the jury why the Supreme Court ruled that the exhibits were nonobscene; and it would serve no valid purpose to permit the jury to speculate as to what would be the holding of the Supreme Court with respect to the exhibits here in issue." Huffman v. United States, 259 A.2d 342, 344 (D.C. Ct. App. 1969), *aff'd*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 23781-2, Oct. 7, 1971). The specter of counsel for both parties arguing to the jury the niceties of legal analysis and interpretation of cases is implicit in appellants' proposed approach.

[9] One court very recently described this procedure in the following terms:

> Where a sufficient foundation for its introduction has been laid, comparable matter held not obscene by the Supreme Court of the United States or of this state may be helpful in drawing this line; but, unless the comparable material equals or exceeds the subject book on

A number of cases which uphold the refusal to admit comparison evidence have nevertheless approved its use in this manner by the judge. This was noted in this court's decision in *Huffman* v. *United States*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 23781-2, decided Oct. 7, 1971), *petition for rehearing granted on other grounds* Aug. 10, 1972:

> We do not say that decisions involving other publications can play no part in the evaluation of a particular magazine or book. *Certainly a judge passing on the legal "obscenity" of material before him will consider whether it is so close to others already passed on by courts as to require a judicial ruling on obscenity without submission to the jury.*

Slip op. at 30-31 (emphasis added).[10] Similarly, in *United States* v. *392 Copies of Magazine "Exclusive,"* 253 F. Supp. 485 (D.Md. 1966), *aff'd* 373 F.2d 635 (4th Cir. 1967), the court expressly left open the question of comparison evidence in a jury trial but concluded that such material from prior "adjudicated cases, whether held obscene or not obscene, should always be considered by the court as illuminating the opinions rendered in those cases, and the items offered here have been so considered." 253 F. Supp. at 495. The use of comparative material to determine

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> all three elements of obscenity, to-wit: appeal to prurient interest; excess overaccepted standards; and lack of evidence of redeeming social importance, such comparable material does not require a finding of non-obscenity as a matter of law.

People v. Kaplan, 23 Cal. App. 3d Supp. 9, 100 Cal.Rptr. 372, 376 (1972).

[10] *See also* People v. Kaplan, *supra;* Huffman v. United States 259 A.2d 342 (D.C. Ct. App. 1969), *aff'd*, —— U.S. App.D.C. ——, —— F.2d —— (Nos. 23781-2, Oct. 7, 1971), *petition for rehearing granted on other grounds*, Aug. 10, 1972.

obscenity as a matter of law also is appropriate at the appellate level.[11]

Therefore the trial court clearly was correct in retaining this comparative legal method solely as his function and refusing to lay it before the jury. Furthermore, on review of the relevant exhibits we hold that the proffered evidence held nonobscene by the Supreme Court is not sufficiently similar to the exhibits at issue at trial as to have required a judgment of acquittal to be entered as a matter of law nor to require our reversal on appeal.[12]

B. *Proving Contemporary Community Standards*

Appellants also sought to introduce comparative evidence to aid the jury in determining the prevailing contemporary community standards.[13] The District Court

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[11] At times an appellate court, on review of the material involved in the prosecution, may decide that it is so similar to matter already held nonobscene by the Supreme Court as to require reversal as a matter of law. Spinar v. United States, 440 F.2d 1241 (8th Cir. 1971). *See also* Commonwealth v. LaLonde, 447 Pa. 384, 288 A.2d 782 (1972).

[12] A more detailed discussion of the similarity of the exhibits appears *infra*, pp. 17-18.

[13] This concept of "contemporary community standards" is one of three elements of the test for obscenity laid down in the *Roth* case. Roth v. United States, 354 U.S. 476 (1957). The standard, as further defined in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482, 486 (1962); Memoirs v. Massachusetts, 383 U.S. 413, 418-19; and Mishkin v. New York, 383 U.S. 502, 508 (1966), requires a showing:

> (a) That the dominant theme of the material taken as a whole appeals to a prurient interest in sex, *Roth* v. *United States*, *supra*, 354 U.S. at 488-89, and that where the material is designed for and primarily disseminated to a clearly defined deviant group, rather than the public at large, the prurient appeal require-

excluded all of defendants' proffered exhibits, applying the doctrine enunciated by this court in *Womack v. United States*, 111 U.S.App.D.C. 8, 294 F.2d 204, *cert. denied*, 365 U.S. 859 (1961).[14]

In *Womack*, a broad range of comparison materials were proffered by the defendant in an effort to show a contemporary community standard of general acceptance of works like his own. The court rejected the comparison evidence as immaterial where the proper foundation had not been shown. Judge Prettyman described the necessary foundation as consisting of two elements: "[1] . . . that the two types of matter are similar. [2] And as another part of his foundation he must show a reasonable degree of community acceptance of works like his own." 111 U.S.App. D.C. at 10, 294 F.2d at 206. Appellants contend that this should not be the rule in modern obscenity prosecutions since in the *Womack* case there was such a wide divergence between the proffered exhibits and the materials that were the subject of that prosecution.[15]

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ment is satisfied if it appeals to the prurient interest of that group. *Mishkin* v. *United States*, *supra*, 383 U.S. at 508.

(b) That the material is patently offensive because it affronts national contemporary community standards relating to the description or representation of sexual matters. *Manual Enterprises, Inc.* v. *Day*, *supra*, 370 U.S. at 482, 486.

(c) That the material is utterly without redeeming social value. *Memoris* v. *Massachusetts*, *supra*. 383 U.S. at 418-19.

Part B of this opinion deals with the second element of the *Roth* test (part (b) above).

[14] "THE COURT: . . . I can indicate to you that I am going to be bound by this Womack case in this trial, that is, the opinion written by Judge Prettyman." (Tr. 21).

[15] Indeed there was a wide divergence. For example, de-

While it is true that the comparison evidence offered in the instant case is not as vastly different from the materials at issue in the trial as in *Womack*, this fact in no way undermines the soundness of the *Womack* test. The foundational requirements established in that case are eminently logical prerequisites under traditional concepts of materiality and relevancy.[16] Moreover, the *Womack* test has recently been applied in this circuit in *Huffman v. United States*[17] and has been explicitly adopted by a number of other circuits as well as in some state jurisdictions.[18]

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fendant attempted to introduce paintings of nudes by Titian, Rembrandt, Raphael, etc., for comparison purposes.

[16] *See generally*, 1 WIGMORE, EVIDENCE §§ 24-29a (3d ed. 1940); MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 185 (2d ed. 1954).

[17] —— U.S.App.D.C. ——, —— F.2d —— (Nos. 23781-2, Oct. 7, 1971), *petition for rehearing granted on other grounds*, Aug. 10, 1972. Petitions for rehearing were granted in *Huffman* on the narrow issue of the test for obscenity in light of the Supreme Court's grant of certiorari in the pending case of Alexander v. Virginia, 212 Va. 554, 186 S.E.2d 43 (1972), *cert. granted*, 408 U.S. 921 (1972). The evidentiary questions involved here were not reached in the opinion accompanying the order granting the petition for rehearing nor is it at issue on certiorari to the Supreme Court.

In this jurisdiction *see also* United States v. Gower, 316 F. Supp. 1390, 1395 n.11 (D.D.C. 1970).

[18] United States v. Manarite, 448 F.2d 583 (2d Cir. 1971); United States v. Jacobs, 433 F.2d 932 (9th Cir. 1970); United States v. West Coast News Co., 357 F.2d 855 (6th Cir. 1966) *rev'd sub nom. on other grounds*, Aday v. United States, 388 U.S. 447 (1967); Huffman v. United States, 259 A.2d 342 (D.C.Ct.App. 1969), *aff'd*, —— U.S.App.D.C. ——, —— F.2d ——(Nos. 23781-2, Oct. 7, 1971), *petition for rehearing granted on other grounds*, Aug. 10, 1972; State v. Carlson, 192 N.W.2d 421 (Minn. 1971).

We are fully cognizant of the notion that expert testimony on contemporary community standards is desirable and may even be a necessary requirement of due process. Most of the impetus behind the use of expert testimony in obscenity cases can be traced to the concurring opinions of Justices Harlan and Frankfurter in *Smith v. California*, 361 U.S. 147, 160, 169 (1959). Those opinions indicated that due process may require some kind of expert testimony to enlighten the court on the community standards element of the *Roth* test. Justice Harlan's opinion alludes specifically to the use of comparison evidence.[19] Many other decisions have echoed this position on the need for objective guidelines to help the court reach a rational decision under the admittedly imprecise *Roth* formula.[20] Yet it is clear that the *Womack* test is perfectly compatible with the *Smith* policy and many cases adopting the *Womack* rule have excluded comparative evidence while

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[19] 361 U.S. at 172. However, he does not go so far as to say the exclusion of comparison evidence would constitute a violation of due process. In his opinion only a total absence of all kinds of expert and objective testimony would so violate the due process clause.

[20] *See, e.g.*, United States v. Klaw, 350 F.2d 155, 170 (2d Cir. 1965); United States v. 392 Copies of Magazine "Exclusive", 253 F. Supp. 485, (D. Md. 1966) *aff'd* 373 F.2d 636 (4th Cir. 1967); Woodruff v. State, 11 Md.App. 202, 273 A.2d 436 (1971); In re Seven Magazines, 268 A.2d 707 (R.I. 1970); Commonwealth v. LaLonde, 447 Pa. 364, 288 A.2d 782 (1972). *See also*, Model Penal Code § 251.4. A small number of cases have understood this general policy to specifically mandate the admission of comparative evidence. Woodruff v. State, 11 Md. App. 202, 273 A.2d 436 (1971); Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962); In re Harris, 16 Cal. Rptr. 889, 366 P.2d 305 (1961). *But cf.* cases cited note 21, *infra*, which allude to the *Smith* rationale but find no inconsistency in also excluding comparative evidence.

simultaneously recognizing the validity of the *Smith* rationale.[21] In this case this inherent consistency is exceedingly apparent. There was in fact extensive expert testimony on both sides as to contemporary community standards. That is all that the Harlan and Frankfurter opinions can be read to have required. As the Sixth Circuit has stated in this regard:

> [W]e are not unmindful of the relevant observations of Justices Frankfurther and Harlan in their concurring opinions in Smith v. People of State of California, 361 U.S. 147, 164, 165, 172, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). We do not content ourselves by saying that those concurrences did not necessarily express the majority view, but are agreed that what the District Judge did in this case [excluding comparison evidence under *Womack*] does not offend the views of those distinguished Justices. We consider that their suggestions of a legitimate range of admissible expert testimony were satisfied by what the experts here were allowed to tell the jury.

United States v. *West Coast News Co.*, 357 F.2d 855, 859 (6th Cir. 1966), *rev'd sub nom. on other grounds, Aday* v. *United States*, 388 U.S. 447 (1967). The *Smith* concurring opinions were in no way intended to eliminate valid, rational rules governing the admissibility of evidence.

Womack merely requires an adequate foundation to be laid for the introduction of comparison evidence. Since the issue at hand is the nature of contemporary community standards with respect to "works like his own," in order

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[21] United States v. West Coast News, Co., 357 F.2d 855, 861 (6th Cir. 1966) *rev'd sub nom. on other grounds* Aday v. United States, 388 U.S. 447 (1967); United States v. 392 Copies of Magazine "Exclusive", 253 F.Supp. 485 (D. Md. 1966) *aff'd* 373 F.2d 633 (4th Cir. 1967); People v. Finkelstein, 11 N.Y.2d 300, 183 N.E.2d 661 (1962). *Compare* United States v. Klaw, 350 F.2d 155 (2d Cir. 1965) *with* United States v. Manarite, 448 F.2d 583 (2d Cir. 1971).

for there to be a rational basis for its admission there must be a showing that the proffered evidence (1) is similar to his own, and (2) enjoys a reasonable degree of community acceptance. The burden is on the defendant [22] and in the absence of such a showing,[23] the evidence must be excluded as lacking sufficient probative value.[24] In this regard the trial judge must be allowed "wide discretion as to whether to permit the introduction of such allegedly comparable publications" since "the admission of a number of different publications alleged to be comparable to the publication in issue might make the trial unmanageably complex and lengthy." [25]

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[22] Womack v. United States, 111 U.S.App.D.C. 8, 10, 294 F.2d 204, 206, *cert. denied*, 365 U.S. 859 (1961).

[23] Such a showing can be made in a variety of ways. The most desirable method would entail a full hearing out of the jury's presence in which the defendant can attempt to demonstrate the necessary foundational requirements. A good example of the proper procedural stance in these matters is found in United States v. West Coast News Co., 228 F.Supp. 171, 191-201 (W.D. Mich. 1964) *aff'd* 357 F.2d 855 (6th Cir. 1966), *rev'd sub nom. on other grounds* Aday v. United State, 388 U.S. 447 (1967), in which the judge conducted a preliminary voir dire of the defendant's experts:

> Instead of foreclosing the introduction of these books for comparison, on the ground that defendants failed to submit an offer of proof to preserve the contested issue, the court granted a full opportunity for the defendants to present oral testimony, out of the presence of the jury, to estalish the required similarity and acceptability as the basis for a "ticket of admission" for such proffered evidence. See Womack v. United States, supra, (294 F.2d page 206), citing Wigmore on Evidence, supra.

228 F.Supp. at 196.

[24] *See* note 16, *supra*.

[25] Books, Inc. v. United States, 358 F.2d 935, 939 (1st

We have carefully reviewed the various exhibits involved in this case and hold that the trial judge did not abuse his discretion in excluding all the proffered comparison evidence. Most of the evidence sought to be introduced was simply unsusceptible of a convincing showing of similarity to the defendants' works. In this connection it is important to realize that "slight" variations in format may well produce vastly different consequences in obscenity determinations. This court, in *Huffman*, recently surveyed the state of obscenity law and observed with regard to photographs of males that various factors such as indoor activity as opposed to out-door nudism and "duals" as opposed to "singles,"[36] result in wholly different legal characterizations.[37] In *Huffman*, the defendant sought to introduce magazines picturing "singles" for comparison with his works which included "duals." We held:

> These magazines . . . fall within the category of "singles". As discussed above, this type of magazine is clearly distinguishable from the genre involved here. . . . Once the judge declines to dismiss the prosecution on legal grounds [*see* part A, *supra*] we think it becomes a matter of sound discretion, that takes into account relatedness and remoteness, whether it is

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Cir. 1966) *rev'd on other grounds*, 388 U.S. 449 (1967). *See also* United States v. West Coast News Co., 357 F.2d 855, 860 (6th Cir. 1966) *rev'd sub nom. on other grounds* Aday v. United States, 388 U.S. 447 (1967) ("to avoid intolerable flooding of the record"); Huffman v. United States, *supra* note 17, slip op. at 31; State v. Von Cleef, 102 N.J. Super. 102, 245 A.2d 495 (1968); State v. Henry, 250 La. 682, 198 So.2d 889, 896 (1967). *See also* Miller v. United States, 431 F.2d 655 (9th Cir. 1970).

[36] "Singles" is the trade term for photographs of only one model, while "duals" applies to photographs of two or more. *See* note 4, *supra*.

[37] *See* Huffman v. United States, *supra* note 17, slip op. at 25, 31.

more likely to be helpful or confusing for the jury to make comparisons with publications passed on in previous cases. In view of the important distinctions between the "duals" photographs in the magazines on trial and the singles in previous cases, we hold the judge did not abuse his discretion in ruling against appellants on this issue. *Womack v. United States*, 111 U.S.App.D.C. 8, 10, 294 F.2d 204, 206 *cert. denied*, 365 U.S. 859 (1961).[28]

Turning to the evidence offered by appellants for comparison purposes in this case, we find that two of the magazines are labeled as marriage manuals and depict heterosexual activity between adults. Another magazine portrays heterosexual acts between adult members of different racial groups. Yet another magazine shows nude and partially nude females in various erotic poses. Appellants also proffered an illustrated version of the Report of the President's Commission on Obscenity containing pictures which run the gamut of bestiality to normal heterosexual activity. The remaining magazines and ten posters depict adult males in various stages of nudity. Many of them portray scenes from the day-to-day life at nudist colonies, while others portray the physiques of weight lifters. Appellant seeks to draw our special attention to certain particular exhibits alleged to be the most similar to those at issue here.[29] Yet on examination we find that they too are vastly dissimilar to his publications. Unlike the subject matter of this prosecution, there are

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[28] Id. at 30-31. *See also* Huffman v. United States, 259 A.2d 842, 344 (1969): ". . . there is a *vast difference* between photographs portraying sexual activity between two nudes and photographs of single nudes. The tendered exhibits would have had no probative weight on the issue before the jury." (emphasis added).

[29] *A Hundred Naked Rebels*, Defense Exhibits No. 27 and 33; and the *Butch* and *Tiger* books, Exhibits No. 34-38. (Appellants' Br. at 16).

no pictures of young boys in "duals" caressing and fondling one another in various positions of simulated sexual activity. Some of the proffered evidence does include young boys in groups but only photographed out-of-doors and containing no suggestion of sexual activity.[30] Under these circumstances we hold the trial judge was well within his wide discretion[31] in excluding these exhibits on grounds of insufficient similarity.

Appellant also had sought to introduce eight magazines published by one of their "competitors" (Tr. 673) which clearly meet the test of similarity.[32] With respect to these eight exhibits the Government contends, however, that appellants failed to meet their burden of showing a reasonable degree of community acceptance as required by the second element of the *Womack* test. This issue has arisen in a number of obscenity cases in which the defendant has sought to introduce similar material purchased in the community in an effort to show a degree of community tolerance and acceptance for works like his own.[33] Of

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[30] This describes *A Hundred Naked Rebels*. The *Butch* and *Tiger* books deal with adults. Most are singles but in the few duals the models are separated and there is no simulated sexual activity.

[31] *See* note 25, *supra* and accompanying text.

[32] Defense Exhibits 32-32g.

[33] Appellants also contend that various court decisions around the country acquitting other defendants on obscenity charges relating to allegedly comparable materials serve a function outside of the "matter of law" role discussed *supra*, Part A, in that they indicate a growing community acceptance of these materials. However, just as the evidence involved in those cases must be similar to appellants' works in order to be introduced as comparison evidence, these court decisions have no logical bearing on the community acceptance of the materials at issue in this case if there is a failure to show the *Womack* foundation of similarity.

course, a determination of the precise point at which a publication is so widely sold and is so generally available in the community as to warrant a finding of community acceptance is difficult to fix with assurance. And a few cases have held that in close cases it is error to exclude such comparison materials.[24] However, it is not difficult to identify that which clearly does not even approach an appreciable level of community acceptance and to exclude that material as possessing so little probative value as to serve only to impede the resolution of the issues. A distinction must be made between a showing of "mere availability" and that of "a reasonable degree of community acceptance:"

> Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. Womack v. United States, 111 U.S.App.D.C. 8, 294 F.2d 204, 206 (1961), cert. denied, 365 U.S. 859, 81 S.Ct. 826, 5 L. Ed.2d 822 (1961). Such proof would normally be supplied by expert witnesses. No such proof was offered. In the absence of this foundation, the allegedly similar pornographic material was properly excluded. Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

United States v. Manarite, 448 F.2d 583, 593 (2d Cir. 1971). In this case, appellants spoke of the materials as having been easily purchased from certain specific suppliers in New York. Yet such esoteric materials purchased from a few vendors known only to those in the trade with no general circulation are not probative on the issue of

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[24] Woodruff v. State, 11 Md. App. 202, 273 A.2d 436 (1971); Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962); In Re Harris, 16 Cal.Rptr. 889, 366 P.2d 305 (1961).

contemporary community standards. This was well stated in the *"Exclusive"* case:

> The standards of "the Block" [an area in Baltimore in which there are a number of shops which deal in pornographic materials] are not the standards to be applied in this case, any more than the standards of the most straight-laced persons. *Material purchased in such specialized outlets has little or no value in determining contemporary community standards.* Ginzburg v. United States, 86 S.Ct. 969 (1966).[35] (Emphasis added.)

The only evidence appellants offered to show community acceptance of these magazines was the fact that as of the date of this trial, no criminal charges had been lodged against their competitors (Tr. 673-75), but mere failure to prosecute does not begin to constitute a sufficient showing on this issue. We hold that with respect to these magazines, appellants have woefully failed to show a reasonable degree of community acceptance. Without such evidence the trial judge can in no way be said to have abused his discretion in excluding the proffered evidence.

C. *Cross-Examination of Expert Witnesses*

Finally, appellants argue that at the very minimum, comparison evidence should be allowed to be presented to the various expert witnesses on the issue of community acceptance, particularly for cross-examination purposes.[36]

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[35] United States v. 392 Copies of Magazine "Exclusive", 253 F.Supp. 485, 496 (D. Md. 1966) *aff'd* 373 F.2d 635 (4th Cir. 1967). *See also* United States v. Gower, 316 F.Supp. 1390 (D.D.C. 1970); United States v. Hochman, 175 F.Supp. 881 (E.D. Wisc. 1959); People v. Finkelstein, 11 N.Y.2d 300, 183 N.E.2d 661 (1962).

[36] Counsel for appellants indicated at oral argument that he would have used the materials declared nonobscene by the Supreme Court to impeach the credibility of the Govern-

The use of comparative evidence for *direct* testimonial purposes on the issue of contemporary community standards is clearly governed by the resolution of the issue of its use as primary autoptical evidence. *See* Part B, *supra*. That is, once the court has determined under the *Womack* guidelines that the probative value of the comparison evidence is insufficient to be material on the issue of community standards, it is equally within the judge's discretion, indeed almost incumbent upon him for reasons of consistency, to exclude the introduction of such evidence through the expert witnesses.[37]

A more difficult question is whether such materials are to be used for cross-examination purposes. It may indeed be helpful for the jury to know that the expert witness holds an opinion contrary to that of the Supreme Court.[38]

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ment's expert witnesses who presumbaly would have testified that they considered these materials as exceeding the bounds of contemporary community standards.

[37] It is only logical and certainly well within the judge's discretion to refuse to permit witnesses to comment on matters already deemed immaterial to the issue at hand. *Cf.* State v. Henry, 250 La. 682, 198 So. 2d 889, 895-96 (1967).

[38] At least one court has felt this to be true:

> While [the Government's] witnesses testified that in their personal view "Candy" far exceeded customary limits of candor, they admitted being totally unfamiliar with contemporary fiction. Two of the witnesses had indeed read "Tropic of Cancer," but despite a clear Supreme Court holding to the contrary (Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed.2d 1035 (1964); see Commonwealth v. Robin, 421 Pa. 70, 218 A.2d 546 (1966)) they continued to believe the book ought to be banned. While we respect these personal opinions, it does indicate that their views of contemporary standards differ markedly from those of the Supreme Court. [Some footnotes omitted.]

Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 233 A.2d 840, 848 (1967).

Apparently one case in this jurisdiction has allowed such use of comparative evidence.[39] However, this is definitely a matter in which the trial judge is to be afforded wide discretion. As Judge Wyzanski has said in a First Circuit decision upholding the trial judge's discretionary exclusion of allegedly comparable material as well as his refusal to allow expert testimony with respect to them:

> Nor is a judge required to admit as a touchstone for the jury *even those books which are admittedly not obscene.* The admission of a number of different publications alleged to be comparable to the publication in issue might make the trial unmanageably complex and lengthy. The trial judge must be allowed wide discretion as to whether to permit the introduction of such allegedly comparable publications, *and as to whether to allow the witnessess to be examined in detail on publications other than the one directly at issue.*[40] (Emphasis added.)

Not only do the dangers of excessive trial length, complexity and unmanageability weigh heavily in favor of according the trial judge broad discretion, but also the undesirability of allowing the jury to speculate as to the

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[39] Huffman v. United States, *supra* note 17, slip op. at 5-6:

> During the trial appellants attempted to challenge the assertion that the magazines were obscene by offering twenty-six other publications that had previously been declared non-obscene by the Supreme Court. The trial court refused to allow appellants to make this comparison to the jury *but permitted appellants to ask Dr. Cavanaugh whether six of the exhibits appealed to prurient interests.* Dr. Cavanaugh testified that individual magazines in this group would appeal to the prurient interests of various classes of persons, including male and female homosexuals, heterosexual males, and pedophiliacs.

(emphasis added).

[40] Books, Inc. v. United States, 358 F.2d 935, 939 (1st Cir. 1966) *rev'd on other grounds* 388 U.S. 449 (1967).

basis for a Supreme Court holding of nonobscenity. That is, in light of the various factors that enter into a legal finding of obscenity and the generally confusing state of this area of law at the time of this trial,[41] it is clearly a matter of broad discretion for the trial judge to balance the dangers of jury confusion against the possible benefits of effectively undermining the credibility of a given witness.[42] In this case the decisions referred to by appellant in which the comparison evidence was held nonobscene were particularly cryptic and to infer a lack of credibility from any inconsistencies between the expert and that decision would be highly speculative and confusing to the jury. Even absent this factor, the judge is always to be

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[41] In recent years the United States Supreme Court has on at least twenty-nine occasions reversed obscenity convictions and determinations involving various kinds of expression (books, photomagazines, films, etc.) on the authority of its cryptic per curiam opinion in Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed.2d 515 (1967). (footnotes omitted).

Commonwealth v. LaLonde, 447 Pa. 364, 288 A.2d 782 (1972); *see also* note 8 *supra*. (A full list of the twenty-nine decisions reversed by *Redrup* appears at n.6 of *LaLonde*.) This has left the courts in some confusion as to the current constitutional standards for obscenity. More importantly, the Supreme Court has agreed to review many of the crucial questions in this area this term.

[42] Admittedly it might be of value to show that an expert witness disagreed with the Supreme Court on a matter in which there has been a full, considered opinion clearly holding a particular publication nonobscene. However, there seems little value in allowing the jury to speculate as to the reasons for the court's decision in the numerous reversals in which the court merely cites the cryptic *Redrup* opinion. *See* note 41 *supra*. In either situation it would be appropriate for the judge to instruct the jury as to the limited weight to be accorded to such a Supreme Court decision and that it is only relevant to the credibility of this particular witness.

allowed broad discretion as to such testimonial matters.[43] We hold here that the judge properly exercised that discretion.

Therefore, with respect to the issue of comparison evidence as a whole, we affirm the rulings of the trial court.

II. *Search and Seizure Issue*

Appellants raise three objections to the warrant used to seize the various incriminating materials involved in this case. The warrant is claimed to be invalid (1) on its face for overbreadth, (2) for lack of a prior adversary hearing, and (3) as calling for a search for "mere evidence" as distinguished from a search for fruits or implements of crime. We find all three objections to be wholly without merit and decline to reverse the convictions on these grounds.

First, there can be no serious claim that the warrant was impermissibly vague as to the items to be seized. The warrant incorporates by express reference the underlying affidavit attached thereto which quite specifically details the records and documents to be obtained in the search. Under these circumstances, we have held the warrant to meet the necessary specificity requirements.[44] Although during execution of the warrant some other materials were seized, all of them were returned and none were used at

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[43] *See e.g.*, 3 WIGMORE, EVIDENCE § 770 (Chadbourn Rev. 1970); MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 29 (2d ed. 1954).

[44] Huffman v. United States, *supra* note 17, slip op. at 9 n.7; Moore v. United States, —— U.S.App.D.C.——, 461 F.2d 1236 (1972).

appellants' trial.[45] This clearly does not affect the validity of appellants' convictions.[46]

Second, the requirement of an adversary hearing prior to the issuance of a warrant is derived from Supreme Court decisions[47] holding that the public's First Amendment rights would be jeopardized if a judge were allowed to suppress large numbers of copies of an allegedly obscene publication simply on the basis of an *ex parte* decision on the issue of obscenity. This authority is clearly inapposite here since this search warrant did not authorize the seizure of any materials protected by the First Amendment but only business records and other correspondence relating to the publication, sale and distribution of the magazines listed in the affidavit and the identity of some of the models.[48]

Lastly, appellants' "mere evidence" argument and citation of the *Gouled* case[49] is entirely inappropriate in light

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[45] United States v. Womack, Crim. No. 1351-70 (D. D.C., filed May 17, 1971) (Memorandum opinion and order on motion to suppress).

[46] Huffman v. United States, *supra* note 17, slip op. at 9 n.7.

[47] A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961).

[48] Moreover, even assuming *arguendo* that a prior adversary hearing were required, the remedy is merely to return the materials. A reversal of the convictions would not be required absent the aggravating factor of a search of impermissible scope. Huffman v. United States, *supra* note 17 slip op. at 8-9. Since here the scope is clearly reasonable, reversal would not be appropriate even if we were to agree with appellants' contentions with regard to the need for a prior adversary hearing.

[49] Gouled v. United States, 255 U.S. 298 (1921) (Appellants' Br. at 35).

of the Supreme Court's complete disavowal of that doctrine in *Warden* v. *Hayden*, 387 U.S. 294, 300-10 (1967) in holding there was no valid basis for prohibiting "intrusions to secure 'mere evidence'" and permitting "intrusions to secure fruits, instrumentalities, or contraband."

Had we reached opposite conclusions on either the evidentiary or the search and seizure issues involved in this case, we would have reversed the convictions. However, since we have upheld the trial court on these issues, we release this opinion at this time and order that the case be held in abeyance with respect to the First Amendment issues to await the decision of the Supreme Court in the pending obscenity cases.

Order accordingly.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1711

UNITED STATES OF AMERICA

v.

HERMAN L. WOMACK, APPELLANT

No. 71-1894

UNITED STATES OF AMERICA

v.

POTOMAC NEWS COMPANY, APPELLANT

SUPPLEMENTAL OPINION

(D.C. Criminal No. 1351-70)

Decided December 31, 1974

Judgment enter this date

Stanley M. Dietz for appellants.

Robert D. Zsalman, Assistant United States Attorney with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *John A. Terry*, and *Donald E. Campbell*, Assistant United States Attorneys, were on the brief, for appellee. *Richard A. Hibey*, Assistant United States Attorney at the time the record was filed, also entered an appearance for appellee. *Thomas A. Flannery*, United States Attorney at the time the record was filed, also entered an appearance for appellee in No. 71-1894.

Before TAMM, *Circuit Judge*, WADE H. MCCREE, JR.,* *Circuit Judge* for the Sixth Circuit, and MACKINNON, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: On December 7, 1972, this court issued an opinion disposing of the evidentiary issues presented by these appeals. That decision deferred action on the following issue:

> whether the eight magazines which formed the basis of appellants' convictions were obscene and not within the free speech guarantees of the First Amendment

pending the decisions in several obscenity cases then before the Supreme Court. Original Op., *supra*, at 4. The deicsions in those cases have since been issued. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Alexander v. Virginia*, 413 U.S. 836 (1973). We now dispose of the remaining issue.

Miller, *supra*, established the following three tests for determining whether a work is obscene:

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24. Appellants are entitled to the benefit of any constitutional principle stated in *Miller*. See *Hamling v. United States*, —— U.S. ——, 42 U.S.L.W. 5035 (June 24, 1974). Only *Miller* test (b) involves modifications of prior principles which would potentially benefit appellants.[1]

Appellants were convicted for violations of 18 U.S.C. § 1461 (mailing obscene matter) and § 1462 (interstate transportation of obscene matter). In *Hamling, supra*, the Court held that section 1461 was not unconstitutionally vague in light of the prior construction of that section in *Roth v. United States*, 354 U.S. 476 (1957), and therefore the statute was sufficient to support a conviction under *Miller* test (b). In *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973), the Court indicated it was prepared to construe the terms of section 1462 "as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* . . . ." The Court reaffirmed this intent in *Hamling*. Thus both statutes under which appellants were convicted satisfy the requirements of *Miller* test (b).

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[1] This case was submitted to the jury under instructions conforming to *Roth-Memoirs* (Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957)), which were more favorable to appellants than *Miller* test (c), *supra*.

In *Miller*, the Court listed certain "plain examples" of the type of material which a statute could regulate under Miller test (b):

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25. The magazines which formed the basis for appellants' convictions are described at note 4 of our original opinion. It is readily apparent that these magazines contain material portraying most of the "plain examples" of obscenity which *Miller* held sufficient to support a conviction. We find beyond a reasonable doubt that this case would have reached exactly the same result had it been tried using (b) of the *Miller* tests. See *United States v. Gower*, —— U.S.App.D.C. ——, 503 F.2d 189 (1974). Nothing approaching the kind of doubt as to the application of *Miller* to the materials in question which required remand in *Huffman & Pryba v. United States*, —— U.S.App.D.C. ——, 502 F.2d 419 (1974) is present in this case.

Appellants argued that the governmental interest in regulating obscenity is limited to the protection of juveniles and the prohibition of public display and pandering of such materials. The Supreme Court has since rejected the argument that the role of the government is so limited. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-69 (1973).

Appellants' convictions are accordingly affirmed as to all counts.

Affirmed.

APPENDIX C

STATUTORY APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1461

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

* * * * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving

information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made

. . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1462

§ 1462. Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.